

Andree Greenberg - Bingham Land Use and Development Alert: Court Muddies the Waters on Federal Shoreline Jurisdiction

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Alert - Land Use and Development

October 29, 2009

Court Muddies the Waters on Federal Shoreline Jurisdiction

In *United States v. Milner*, the Ninth Circuit ruled that federal jurisdiction under the Rivers & Harbors Act is defined by where the mean high water line would have been had shore-defense structures such as seawalls and levees never been built, while jurisdiction under the Clean Water Act is generally demarcated by the mean high water line as it presently exists. The decision complicates federal jurisdiction over shoreline projects, especially in the Bay Area and along the Delta, where development has significantly altered the boundary that divides land from water.

In *Milner*, a group of homeowners in western Washington built structures to protect their homes from shoreline erosion. At the time they were built, the structures were located on the landward side of the mean high water line, which is the average of all high tide lines over a period of years. However, the mean high water line had moved inland over time, and some of the structures came to be located on the seaward side of the line, in tidelands owned by the federal government in trust for the Lummi Nation. The government sued the homeowners, claiming trespass on federal land and violations of the Rivers & Harbors Act and the Clean Water Act.

The court first ruled that the homeowners were liable for trespass. The court explained that the federal government, as owner of the tidelands, has a "vested right" to any gains that resulted from the landward movement of the mean high water line.

The court next found a violation of the Rivers & Harbors Act, which requires a federal permit to build in navigable waters. According to the court, a permit is required for structures currently located on the seaward side of the mean high water line, even if the structures were initially built on dry land. The court stated: "The homeowners' structures may have been legal as initially built, but because of the movement of the tidal boundary they now sit in navigable waters."

The court then announced that a permit is required under the Rivers & Harbors Act for structures *that would have been* on the seaward side of the mean high water line if the shoreline had been allowed to reach "its unobstructed, natural state." Under this line of reasoning, a

structure may require a federal permit if it prevents the shoreline from advancing, even if the structure is currently located, and has always been located, on dry land.

In addressing jurisdiction under the Clean Water Act, the court adopted a different test, ruling that jurisdiction is generally demarcated by the mean high water as it presently exists, "not as it would be in its unobstructed, natural state." The court reasoned that the different regulatory purposes behind the two laws justified differing jurisdictional standards.

The ruling is likely to complicate jurisdictional determinations under the Rivers & Harbors Act, which could require extensive scientific evaluation to ascertain where the mean high water line would have been under a hypothetical set of historical circumstances. For projects subject to both the Rivers & Harbors Act and the Clean Water Act, jurisdictional determinations may be especially complicated, since different legal standards may apply to the same set of circumstances. The bottom line is that permitting for projects along the shoreline, particularly in the Bay Area and the Delta, could become more expensive and time-consuming.

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